IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-267

SANDRA P. FLETCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Sandra P. Fletcher, the petitioner herein, requests that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled case on May 24, 1976.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 358 A.2d 322 (D.C. App. 1976) and is printed in Appendix A hereto, *infra*, page 1a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on May 24, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the trial court's refusal to allow defense counsel to cross-examine the prosecution's only witness concerning hostility and bias exhibited during a conversation between that witness and an Assistant United States Attorney denied petitioner her constitutional right to confront the witnesses against her.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On January 27, 1975, petitioner, Sandra P. Fletcher, was arrested for shoplifting in the Woodward and Lothrop department store in Washington, D.C. She was subsequently charged with attempted petit larceny (D.C. Code 1973, §22-103 and 22-2202) and assault (D.C. Code 1973, §22-504). Ms. Fletcher was tried by a jury in the Superior Court of the District of Columbia on May 14, and 15, 1975. The jury rendered a verdict of guilty of attempted petit larceny and not guilty of assault. Ms. Fletcher appealed this verdict to the District of Columbia Court of Appeals, which on May 24, 1976 affirmed the judgment of the lower court.

Janet Valentine, a store detective for Woodward and Lothrop, and the person who arrested Ms. Fletcher, was the only witness for the government. Sandra Fletcher was the only defense witness to testify concerning the incident. Their two versions of the event were significantly different and therefore the credibility of these witnesses became a crucial factor for the trier of fact.

Sandra Fletcher testified that she placed the items in question on the top of a shopping bag she was carrying. She stated that she did not attempt to leave the immediate area in which she was shopping, and had no intent to leave without paying (Tr. 89).[1] She was arrested two or three feet from the counter from which the items were taken (Tr. 97). Janet Valentine testified that Ms. Fletcher hid the items underneath a bunny rabbit that was in her bag, that Ms. Fletcher walked around the floor for two or three minutes and then got on an escalator to the first floor (Tr. 18). Ms. Valentine

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[1] "Tr" refers to the transcript of petitioner's trial which is a part of the record herein.

claims she arrested Ms. Fletcher in the middle of the first floor.

Janet Valentine also claimed that Ms. Fletcher ran away two or three times, in handcuffs (Tr. 22), and that she was forced to mace the petitioner when Ms. Fletcher began kicking and biting her (Tr. 55, 20). Sandra Fletcher stated that she stepped back when they reached the office door so that the door could be unlocked and opened. Ms. Valentine then maced Ms. Fletcher. Nervous and frightened, Sandra Fletcher bit Janet Valentine in the hand when the mace stung (Tr. 92, 93). Ms. Fletcher denied running away two or three times or kicking Ms. Valentine (Tr. 100, 101).

Prior to trial defense counsel met with an assistant United States Attorney to discuss Ms. Fletcher's eligibility for First Offender Treatment, a discretionary diversion program conducted by the U.S. Attorney's office. Though the assistant U.S. Attorney decided Ms. Fletcher qualified for this program, it was the position of his office that Janet Valentine would have to agree to such a disposition (Tr. 64, 65). Ms. Valentine would not agree (Tr. 65), effectively vetoing Sandra Fletcher's entry into the program. Janet Valentine indicated to the assistant United States Attorney that she was adamantly opposed and made several statements to that effect (Tr. 5).

During cross-examination of Janet Valentine defense counsel sought to question her concerning the contents of her statements to the assistant United States Attorney to show that she was hostile to and biased against Sandra Fletcher. At a bench conference, defense counsel, citing relevant case law, stated:

> . . . the bias, the hostility of a witness is something which is an eminently proper subject of cross examination, and any restriction on that cross examination in effect deprives the defendant of a fair trial. . . . (Tr. 63)

The trial court refused to allow defense counsel to conduct any examination of Ms. Valentine concerning her conversations with the assistant U.S. Attorney for three reasons:

> First, because it occurred, as I was saying, during an effort to achieve an amicable disposition in the case, and to allow that type of testimony in, Mr. Temple, would be damaging to the First Offender Treatment program.
>
> Secondly, because insofar as you know, from listening to Mr. Couvillion as he talked to the witness, and after he was through, is that the witness said that she wouldn't go along with the First Offender program, and for that reason, the case would have to go forward.
>
> And thirdly, because in my judgment, what your (sic) saying, that does not demonstrate a type of hostitlity which would warrant opening this matter to cross examination. She was allegedly assaulted by your client, and as any other citizen whose (sic) assaulted in the streets or any place else, she has a right to have the case go forward. . . And the fact that somebody goes down and seeks an arrest warrant for somebody who was arrested does not demonstrate a type of hostility; that is admissable in evidence. (Tr. 68, 69)

On appeal to the District of Columbia Court of Appeals Ms. Fletcher raised as her sole appellate issue whether she was denied her right under the Confrontation Clause to adequately cross-examine the complaining witness. The District of Columbia Court of Appeals affirmed the judgment of the trial court. The Court of

Appeals felt that Ms. Valentine's refusal to sanction a diversion program for Ms. Fletcher, including her statements relating thereto, "... was not the sort of situation 'possessing a potential for connoting bias....'" (App. A, *infra*, p. 5a). That court analogized Ms. Valentine's actions with those of a citizen who simply decides to press charges against an individual but in so doing ignored the potential that the contents of Ms. Valentine's conversations with the prosecutor may have indicated bias and hostility of such a magnitude as to have influenced her testimony at trial.

REASON FOR GRANTING WRIT

The District of Columbia Court of Appeals has rendered a decision which is not in accord with the constitutional principles enunciated by this Court. In *Davis v. Alaska*, 415 U.S. 308 (1974), this Court reaffirmed the basic right of an accused to question a witness against him about facts which would tend to establish the witness' bias. Since the partiality of a witness is always a relevant area of inquiry, a trial court's denial of defense attempts to make a record from which to argue bias to the trier of fact denies the defendant the right to effective cross-examination.

When counsel for petitioner attempted to cross-examine the only government witness concerning her manifestations of bias or hostility, this line of inquiry was cut off *in limine*. By misapplying *Davis v. Alaska, supra*, the District of Columbia Court of Appeals affirmed the trial court. The Court of Appeals, however, only cited *Davis* to support the "... proposition that trial courts have broad discretion in regulating the extent and scope of cross-examination of witnesses for bias

or prejudice." (App. A., *infra*, p. 3a). While this proposition is undoubtedly true, it ignores the common fact crucial to the determination of *Davis* and the instant case. The principle involved is not the "scope" of cross-examination but rather its complete prohibition concerning a most relevant area of inquiry, the bias of a witness. Properly applied to the facts of the instant case, *Davis v. Alaska, supra*, would mandate a reversal.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9750

SANDRA P. FLECHER, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Submitted April 7, 1976 Decided May 24, 1976)

William Jordan Temple for appellant.

Earl J. Silbert, United States Attorney, *John A. Terry*, *Stuart M. Gerson*, *Sallie H. Helm* and *Andrea L. Harnett*, Assistant United States Attorneys, were on the brief, for appellee.

Before FICKLING, KERN and NEBEKER, *Associate Judges.*

KERN, *Associate Judge:* Appellant was convicted of attempted petit larceny after trial by jury on May 15, 1975. D.C. Code 1973, §§ 22-103, -2202.[1] She appeals from this conviction on the ground that she was denied her right under the confrontation clause of the Sixth

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[1] Appellant was charged with simple assault, D.C. Code 1973, § 22-504, at the same time she was charged with attempted larceny, and she was acquitted by the same jury that found her guilty of the attempted larceny charge.

Amendment to cross-examine adequately the complaining witness in an attempt to show bias against appellant. We affirm.

The only witness for the government was a store detective for Woodward & Lothrop, Inc., Ms. Valentine. She testified that on January 27, 1975, she observed appellant in the store place several items of merchandise in a brown shopping bag she was carrying, look around, cover the bag with a stuffed toy, and walk away. Ms. Valentine followed appellant up an escalator after appellant had passed several open cash registers, placed appellant under arrest, and handcuffed her. Ms. Valentine testified that as she was escorting appellant to the security office, appellant bent down and bit her, breaking the skin on her hand. Appellant then started to run and Ms. Valentine chased her. Appellant ran away three times, kicking and struggling in an attempt to escape, and eventually Ms. Valentine used mace spray to subdue her.

At the trial, the court refused to allow appellant's attorney to cross-examine Ms. Valentine concerning statements allegedly made by her to an Assistant United States Attorney, Mr. Couvillion. The United States Attorney's Office evidently had considered pursuing First Offender Treatment for appellant rather than prosecuting her. However the office would not proceed with this program without the approval of the complaining witness, and Ms. Valentine did not approve of this diversion. Appellant now argues that Ms. Valentine's insistence on pressing charges constitutes evidence of bias which should have been presented to the jury by cross-examination.

This appeal presents the novel issue of whether a complaining witness may be impeached for bias as a result

of statements made to a prosecuting attorney concerning prosecution of the crime about which the witness is testifying, rather than for any bias resulting from contacts or experiences unrelated or collateral to the matter in issue, as is the usual case. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974) (attempted impeachment of witness with prior juvenile record to show ulterior motive in identifying defendant in order to shift suspicion away from himself); *Best v. United States*, D.C.App., 328 A.2d 378 (1974) (attempted impeachment of arresting officer with evidence of alleged police brutality after arrest); *United States v. Wright*, 160 U.S.App.D.C. 57, 489 F.2d 1181 (1973) (attempted impeachment of police officer with evidence that he was a homosexual and that defendant had rejected his advances). Of course, if the mere pressing of charges against a defendant constituted some evidence of bias or hostility, then every complaining witness could be deemed biased and hostile and subject to cross-examination on this specific aspect.

We start with the proposition that trial courts have broad discretion in regulating the extent and scope of cross-examination of witnesses for bias or prejudice. *See Davis v. Alaska, supra; Hyman v. United States*, D.C. App., 342 A.2d 43, 44-45 (1975); *Best v. United States, supra* at 381; *Howard v. United States*, 128 U.S.App. D.C. 336, 341, 389 F.2d 287, 292 (1967). In making its decision, the trial court may balance the need for and probative value of the cross-examination against the potential harm it may cause. *See United States v. Wright, supra* at 62, 489 F.2d at 1186. Further, "courts have traditionally exercised their inherent power to confine the impeaching effect to evidentiary items possessing a potential for connoting bias." *Austin v. United States*, 135 U.S.App.D.C. 240, 243, 418 F.2d 456, 459 (1969). And this court may review the trial court's action in

this regard only for abuse of discretion. *See Davenport v. United States*, D.C.Mun.App., 61 A.2d 486, 489 (1948); *Howard v. United States*, *supra* at 341, 389 F.2d at 292; *cf. Alford v. United States*, 282 U.S. 687, 694 (1931).

Appellant claims that she should have been allowed in front of the jury to explore Ms. Valentine's potential for bias. However, all of the foundation for any possible bias on Ms. Valentine's part was already before the jury. They had heard her testify that after the arrest appellant bit her, attempted to run away several times, and kicked and struggled until Ms. Valentine subdued her with mace. Appellant's attorney, of course, had cross-examined complainant fully after this testimony. Any further questioning about the complainant's bias or prejudice could only have amplified on these facts, since appellant made no proffer of any other source for potential bias. *Cf. Best v. United States*, *supra* at 382 & n.3.

We are not persuaded that the trial court's refusal to allow examination of the complaining witness in this case about statements she allegedly made to a prosecutor, which led to appellant's prosecution for attempted petit larceny and assault, constitutes prejudicial error. Appellant argues that there was more involved here than the complainant's pressing charges, since evidently the United States Attorney's Office did not believe prosecution was appropriate in this instance and only proceeded at Ms. Valentine's insistence. As the trial court noted, however, Ms. Valentine:

> was allegedly assaulted by [appellant], and as any other citizen whose [*sic*] assaulted in the streets or any place else, she has a right to have the case go forward . . . . And the fact that somebody goes down and seeks an arrest

> warrant for somebody who was assaulted does not demonstrate a type of hostility . . . that is admissible in evidence.

This was not the sort of situation "possessing a potential for connoting bias," *Austin v. United States*, *supra*, and consequently we conclude that the trial court did not abuse its discretion in deciding, after weighing the arguments on both sides, that the proposed examination was inappropriate.

Affirmed.